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Does the Treaty Power Threaten Our System of Limited Government?

The Honorable Ted Cruz

Abstract

American sovereignty and the structural constraints present in the Constitution that protect our liberty are both implicated in Bond v. United States*, a case before the Supreme Court this term. The Court will consider whether the Treaty Clause can be used to circumvent the structural limits on the power of the federal government. The Treaty Clause is not a trump card that may be used to bypass constitutional restrictions. Just as no treaty could give away the core constitutional responsibility of our federal courts, no treaty may expand the powers of the federal government beyond its constitutional limits. It is important that the Supreme Court uphold the structural limitations on federal power with an eye toward the Tenth Amendment, our federalist system, and protecting United States sovereignty.*

Let me say at the outset, it is a particular privilege being here at Heritage. Heritage plays such an important role in helping articulate and defend conservative principles across this country, and in no fight has that been more apparent than in the fight over stopping the enormous harms that are coming from Obamacare. Heritage has played an absolutely leading role in that fight, and I certainly am grateful to be fighting alongside it.

Now, the topic this morning is not Obamacare, but is instead two of my favorite topics: U.S. national sovereignty and the structural constraints that are present in the Constitution that protect our liberty. Both of these are implicated in the Supreme Court's case, *Bond v. United States*.[1]

Key Points

- The central question in *Bond v. United States* is whether a treaty can expand the authority of the federal government beyond the constitutional limits that would otherwise apply.
- In *Medellin v. Texas*, the Supreme Court concluded that the World Court has no authority to bind the U.S justice system and the President of the United States has no authority to order the state courts to obey the World Court.
- The proposition that the Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government is not logically defensible.
- In *Bond v. United States*, the Supreme Court should interpret the treaty power with an eye toward the Tenth Amendment, our federalist system and the structural limitations on the federal government, and protecting United States sovereignty.

This paper, in its entirety, can be found at **http://report.heritage.org/hl1240**

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I'd like to talk to you for a few minutes about *Medellin v. Texas*.[2] Many of the issues in *Medellin* are implicated in *Bond* and go to core issues of sovereignty and the structural protections of our liberty.

Threats to U.S. Sovereignty from the World Court's *Avena* Decision

Medellin is a case that began with a horrific crime that occurred in Texas in the early 1990s where two teenage girls were tragically attacked and murdered by a gang. It was as ugly a criminal case in terms of what happened to those little girls as you could ever see. The case took a very strange turn because one of the gang members, José Ernesto Medellin, was apprehended, and he confessed in writing and was convicted.

But it so happens that Medellin was a Mexican national. He had been born in the nation of Mexico, and although he had lived almost his entire life in the United States, he was, technically speaking, still a Mexican national.

There are a series of international treaties, most notably the Vienna Convention on Consular Affairs, that provide that when an individual in a signatory nation is arrested in a foreign nation, that individual has a right to contact his consulate. It's been interpreted as putting an affirmative duty on the arresting officials to inform arrested individuals of that right.

There's no dispute that nobody informed Medellin of his right to contact the Mexican consulate. So he was convicted and sentenced to death. Four years later, on federal habeas review of his conviction, his lawyers raised for the first time the Vienna Convention issue.

Roughly concurrently, the nation of Mexico sued the United States in the International Court of Justice—known as the World Court—based on the Vienna Convention. The World Court issued a decision in a case called *Avena* that was remarkable.[3] It was a decision that purported to order the United States to reopen the convictions of 51 murderers across this country, all of whom were Mexican nationals who had been convicted of murder and had not been informed of their right to contact the Mexican consulate by local law enforcement.

It was the first instance of a foreign court trying to bind the United States and to bind our criminal justice system. It was an extraordinary exertion of power by the World Court. Unsurprisingly, Medellin's lawyers immediately began seizing upon this decision from the World Court, and they argued that he was entitled to have his conviction reopened. His case went to the U.S. Supreme Court twice.

The *Avena* case was the first instance of a foreign court trying to bind the United States and to bind our criminal justice system.

The case took an even stranger turn because while the case was pending, then-President George W. Bush signed a two-paragraph order that purported to order the state courts to obey the World Court. It was an extraordinary order. The second time *Medellin* was before the Supreme Court, there were two issues at stake:

- Does the World Court have the authority to bind the U.S. justice system to reopen final criminal convictions?

- Does the President of the United States have the authority to order the state courts to submit to the authority of the World Court?

For anyone who is a student or fan of constitutional law and of the constraints upon the exercise of federal powers, these were issues that really go to the heart of federalism and the separation of powers. Texas argued in *Medellin* that the answer to both of these questions was resoundingly "No." The World Court had no authority to bind the U.S. justice system because the treaties at issue were not what is called self-executing.

A self-executing treaty has binding domestic legal force by virtue of its ratification. It doesn't need anything additional to have binding domestic legal

1. 681 F.3d 149 (3d Cir. 2012), *cert. granted*, 81 U.S.L.W. 3408 (U.S. Jan. 18, 2013) (No. 12-158).
2. 552 U.S. 491 (2008).
3. Case Concerning Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. 12 (Mar. 31).

force. A non-self-executing treaty is essentially a contract between nations, but it doesn't have binding domestic legal force unless and until Congress, in conjunction with the President, passes legislation giving it binding legal force. The Vienna Convention on Consular Affairs was non-self-executing, which means it didn't have binding legal force, and one of the things President Bush was effectively trying to do was unilaterally transform a non-self-executing treaty into a self-executing treaty that is binding.

The Bill of Rights would be a hollow document indeed if all of those rights were read as having an asterisk at the end stating "unless a treaty is passed that takes away this right."

At the end of the day, the Supreme Court agreed with Texas across the board. We won by a vote of six to three. The Court concluded that the World Court has no authority whatsoever to bind the U.S. justice system and the President of the United States has no authority to order the state courts to obey the World Court. Those were both incredibly significant decisions going to both U.S. sovereignty and the structural constraints on government.

Can a Treaty Expand the Power of the Federal Government?

This term, the Supreme Court is considering *Bond v. United States*. This case involves a Pennsylvania woman named Carol Anne Bond who committed an unfortunate crime. She discovered that her husband had been with another woman and had impregnated that woman. Mrs. Bond was pretty unhappy about it, so she got a chemical and put it on the mailbox and doorknob of this woman, who suffered burns as a result.

This was an act of assault and something that state criminal law for hundreds of years has been able to handle. If you use chemicals to burn someone, you'll be prosecuted. Except Mrs. Bond wasn't prosecuted locally. She was prosecuted instead for violating the Chemical Weapons Convention Implementation Act, which implemented a treaty prohibiting chemical weapons. In this case, it wasn't sarin gas that was used. It wasn't something typically understood as a "chemical weapon" in the sense of weapons of mass destruction that are typically the subject of these treaties. It was a chemical that was harmful and burned this woman.

The central question before the Supreme Court is whether a treaty can expand the authority of the federal government beyond the constitutional limits that would otherwise apply. That is a tremendously important question.

At the heart of what's at issue is a famous sentence from Justice Oliver Wendell Holmes in 1920 in a case called *Missouri v. Holland*: "If the treaty is valid, there can be no dispute about the validity of the statute [implementing it] under Article I, Section 8, as a necessary and proper means to execute the powers of the Government."[4] That sentence has been relied on over and over again to support the proposition that the Treaty Clause can be used to circumvent the structural limits on the power of the federal government. In my view, it's an absurd proposition that the Treaty Clause can subsume or trump every other structural protection of the federal government, but that phrase has been cited for that proposition.

Under this theory, the treaty power could ostensibly be used to bypass two types of constitutional restrictions. One is explicit prohibitions, such as the Bill of Rights. Surely, it cannot be the case that the President of the United States could circumvent the First Amendment and restrict the freedom of the press, our freedom of speech, our free exercise of religion, simply by finding some nation somewhere to sign a treaty and somehow getting the Senate to ratify it. Surely, it could not be the case—as our current President is trying to do with the U.N. Small Arms Treaty—that a treaty could be used as a backdoor way to undermine the individual protections of the Second Amendment right to keep and bear arms. The Bill of Rights would be a hollow document indeed if all of those rights were read as having an asterisk at the end stating "unless a treaty is passed that takes away this right."

In the second *Medellin* oral argument, Chief Justice John Roberts asked a question to that effect: Suppose the World Court had simply said the arresting officers who failed to notify Medellin of his consular right must be thrown in jail for five years? That

4. 252 U.S. 416, 432 (1920).

contravenes a number of provisions of our Bill of Rights, including the right to trial by jury. The Chief Justice was saying it could not be the case that, simply because of the President's order, the United States would be obliged to throw that arresting officer in jail for five years because it would further comity.[5]

If you put that in the *Bond* context, there's a second question about the structural limits on the power of the federal government. There are some, particularly in the legal academy, who view the structural limits as really all but nonexistent—kind of details—and believe that a treaty could get around those. In my view, the structural limits are fundamentally about protecting individual liberty, about restraining governmental power to protect the liberty of our citizens.

If a treaty is not bound by the structural limitations, that would essentially treat the principles of federalism and the structural limitations on the federal government like second-class constitutional provisions.

I would note also that in *Medellin,* the issue of structural limits on government was raised, once again with regard to the President's order. The Department of Justice argued that the President had authoritatively interpreted the treaty and that his interpretation was binding, but Texas relied on *Marbury v. Madison,* which says, "It is emphatically the province and duty of the judicial department to say what the law is."[6] In attempting to impose a binding interpretation of the treaty that was contrary to what the Supreme Court had said, the President was usurping the Article III authority of the Supreme Court. No treaty could give away the Article III decision-making power of our courts to another body. That exceeded the treaty-writing authority, to hand over the core constitutional responsibility of our federal courts.

The first time *Medellin* was argued, Justice Antonin Scalia asked if the President could sign a treaty making Kofi Annan the commander in chief of our U.S. armed forces.[7] Could the President of the United States by treaty give away his core Article II authority? Of course, the President could not make anybody else commander in chief, because the President is the only individual given that authority under Article II of the Constitution. So if he can't give away his Article II power, why could the President give away our Article III power?

If a treaty is not bound by the structural limitations—either of the separation of powers between Article I, Article II, Article III, the different branches of government, or federalism and the Tenth Amendment, the limits between the federal government and the states—that would essentially treat the principles of federalism and the structural limitations on the federal government like second-class constitutional provisions.

Take the *United States v. Lopez* decision, a landmark decision of the Rehnquist Court that struck down the federal Gun Free School Zones Act as being beyond the authority of Congress to legislate something that was purely intrastate.[8] The Gun Free School Zones Act had been justified as a matter of regulating interstate commerce in the Supreme Court. In his decision, my former boss, Chief Justice William Rehnquist, wrote that we should start with first principles: It is beyond the authority of Congress to regulate what should be a local state criminal matter. Now, that doesn't mean something shouldn't be illegal, but not everything that's illegal has to be illegal as a federal matter. There's a reason we have 50 states and local governments.

If the meaning of *Missouri v. Holland* is that a treaty can circumvent the enumerated powers in Article I, Section 8, and there's no need to ask if Congress has the authority to legislate here to begin with, then that's an easy way around the *Lopez* decision. The President could simply sign a treaty with

5. Transcript of Oral Argument at 4, Medellin v. Texas, 552 U.S. 491 (2008) (No. 06-984), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/06-984.pdf.

6. 5 U.S. (1 Cranch) 137, 177 (1803).

7. Transcript of Oral Argument at 11, Medellin v. Texas, 544 U.S. 660 (2005) (No. 04-5928), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/04-5928.pdf.

8. 514 U.S. 549 (1995).

any country saying we're going to agree to ban guns in all of our schools, get it ratified by the Senate, and it's no longer relevant whether or not the federal government has the authority to regulate purely local matters, because there's suddenly a backdoor giving the federal government authority it didn't have before.

There's no need for a federal law governing violence between two individuals on a purely local level that doesn't cross state lines and doesn't implicate interstate commerce. That is a matter our Constitution has left to the states.

Another issue similar to that is the *United States v. Morrison* case, where the Court struck down a portion of the Violence Against Women Act.[9] Everyone agrees violence against anybody is a terrible thing and should be punished vigorously. Indeed, in the case of Mrs. Bond, she used chemicals to burn someone else. There's no doubt that—assuming those are the facts—she should face criminal prosecution for that conduct. The question is, who should prosecute her and under which law? The Supreme Court concluded in *Morrison* that the states have for centuries had robust laws protecting against violence on a purely local matter.

There's no need for a federal law governing violence between two individuals on a purely local level that doesn't cross state lines and doesn't implicate interstate commerce. That is a matter our Constitution has left to the states. If this broad interpretation of *Missouri v. Holland* is accurate, and if a President finds the limitations on the federal government's authority irksome, he has a simple path to get around it: Find any nation to negotiate a treaty agreeing to do what you couldn't do otherwise, and if the Senate ratifies it, suddenly the federal government has authority it didn't have before. That is a radical interpretation of the treaty power, and that is what is at stake in *Bond*.

It may be possible for the Supreme Court to distinguish *Missouri v. Holland*, but if the Court can't distinguish it, then *Missouri v. Holland* should be overruled. The proposition that the Treaty Clause is a trump card that defeats all of the remaining structural limitations on the federal government is not a proposition that is logically defensible. That's what the Court will be wrestling with.

In *Medellin v. Texas*, they did the right thing. They defended U.S. sovereignty. They upheld the structural limitations on federal power that serve to protect individual liberty. And it is my hope that in *Bond v. United States*, the Supreme Court interprets the treaty power with an eye toward the Tenth Amendment, our federalist system and the structural limitations on the federal government, and protecting United States sovereignty.

Questions & Answers

QUESTION: In the *Medellin* case, the President was effectively precluded from picking and choosing the laws he wanted to enforce, yet I have noticed in the past five years or so that the President has picked and chosen lots of laws to enforce. How is it that that now happens so routinely?

SENATOR CRUZ: This is one of the most disturbing aspects of President Obama's Administration. This Administration has not respected the rule of law and has consistently flouted the constitutional limits on the authority of the President.

As you note, the President has picked and chosen which laws to enforce and which laws not to enforce. In the immigration context, the President simply announced he wasn't going to enforce certain aspects of our immigration laws. In the drug context, the Attorney General announced they weren't going to enforce aspects of our drug laws.

Now, as a policy matter, it may be that some people in this room agree with those policy decisions. But prior to this presidency, the way you made reasonable modifications to federal law is you went to Congress, you introduced legislation, you worked with elected representatives of both parties, you passed a change in the law, and you signed it into law. That's the way the constitutional system worked.

What this President has begun doing is simply deciding not to work with Congress to get things changed. As the President said in two State of the Union addresses, "If Congress won't act, I will." That is a dangerous assertion of power.

9. 529 U.S. 598 (2000).

The President under Article II has a constitutional obligation to take care that the laws be faithfully executed. If you look at Obamacare, the pattern on Obamacare has been really stunning. We all know big business got a one-year delay on Obamacare—because the President decreed it to be so. The statute applies on January 1, 2014. For a couple of hundred years, when a statute said there was a legal obligation that applied on January 1, it meant that on January 1, that legal obligation kicked in. This Administration simply decided not to enforce that part of the law, and they did so through a blog post from a mid-level Department of the Treasury staffer that was posted on a Friday afternoon. That pattern, I think, is very dangerous.

I'll note two things. In the Senate, I am the ranking member on the Senate Judiciary Subcommittee on the Constitution. In that capacity, we put out a report detailing assertions of federal power by this Administration. Bold, broad, aggressive assertions of federal power that this Administration has made before the Supreme Court have been rejected by all nine justices.

The Administration argued that the federal government has the authority to put a GPS on your cars with no probable cause, no reasonable suspicion—just to know where you are. As I read it, I thought the Fourth Amendment had something to say about that. Fortunately, the Supreme Court agreed and unanimously said the Obama Administration doesn't have that authority.

There was another case, *Hosanna-Tabor v. EEOC*, where Justice Elena Kagan, who was previously Solicitor General under President Obama, asked the Obama Justice Department lawyer, "Is it your position that the First Amendment says nothing about whether and how a church may hire its ministers and the employees who work for the church?" The Justice Department lawyer said, "We see nothing in the First Amendment that addresses the ability of a church to decide who its pastors are going to be and who can work for the church." Justice Kagan said she found that position to be "amazing."[10]

QUESTION: The Convention on the Rights of Persons with Disabilities is a treaty that veteran service organizations are supporting because of the relationship with disabled veterans. Could you speak a little bit to how important the reservations, understandings, and declarations are to make a treaty better or to make them agreeable to a conservative Senator like yourself? How important is that?

SENATOR CRUZ: The reason this treaty has not been ratified is because of concerns about its impact on U.S. sovereignty. In the United States, we have vigorous laws—indeed, laws that lead the world in terms of protecting the rights of those with disabilities. The Americans with Disabilities Act expanded access for people with disabilities and made major inroads in terms of allowing people who previously had not been able to access public facilities to be able to access public facilities. That's existing law now.

The concern over this treaty is that it would undermine sovereignty by creating the ability to use international bodies to enforce extant legal obligations on the United States without going through the legislative process, without going through Congress. That's the concern. It is a real concern.

What this President has begun doing is simply deciding not to work with Congress to get things changed.

I would note, in terms of access elsewhere, other countries who have signed on, to the extent they wish to comply with the treaty, will do so regardless of whether the United States ratifies that treaty. If other nations that have signed on decide to expand their access, which is the issue you're focused on, they're going to do it or not regardless of whether the United States is a signatory because there are other nations that are signatories.

In *Medellin*, the nation of Mexico argued in front of the World Court and argued in front of the Supreme Court that the United States should be bound by the judgment of the World Court. In fact, we had 90 foreign nations come in against the state of Texas in front of the Supreme Court arguing that the U.S. justice system should be bound by the judgment of the foreign court. Do you know how many of those 90 nations enforce judgments of the World Court in their courts? Zero. These nations said the United States alone should give up its sovereignty.

10. Transcript of Oral Argument at 38, Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 132 S. Ct. 694 (2012) (No. 10-553), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-553.pdf.

That's part of the concern with the Convention on the Rights of Persons with Disabilities, because ratification is not going to materially change the degree of compliance by foreign nations, but it is going to open avenues to undermine sovereignty and challenge U.S. law. I think if those issues are not adequately dealt with, the treaty is unlikely to be ratified.

*—**The Honorable Ted Cruz** represents Texas in the United States Senate, where he serves on the Armed Services; Commerce, Science, and Transportation; Judiciary; and Rules and Administration Committees, as well as the Special Committee on Aging, and as the Ranking Member of the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights.*